EZREEN NASUHA RAZULI v. PP

HIGH COURT SABAH & SARAWAK, SIBU
WONG SIONG TUNG J
[CRIMINAL APPEAL NO: SBW-41S-4-12-2023]
21 OCTOBER 2024

Abstract – *(i) The terms 'anything' and 'thing' under s. 37(1) of the Minor Offences Ordinance 1958 (Sarawak) (Cap 56) refer to a tangible item, and not to a chose in action. In the event the subject matter of a charge under the said section is a chose in action, and not a tangible item, such charge will be rendered as defective; (ii) The failure of a Magistrate to properly explain to an accused regarding the nature and consequences of a plea of guilty, would not amount to a miscarriage of justice if, at all the material times, the accused was afforded with the opportunity to retract his plea of guilty.*

CRIMINAL PROCEDURE: *Charge – Defective charge – Accused charged under s. 37(1) of Minor Offences Ordinance 1958 (Sarawak) (Cap 56) ('Ordinance') for offence of being found in possession of money in personal bank account without satisfactory explanation – Accused convicted and sentenced under charge – Whether money found in personal bank account chose in action – Whether s. 37(1) of Ordinance applicable to tangible and intangible assets – Whether conviction and sentence safe*

CRIMINAL PROCEDURE: *Appeal – Plea of guilty – Accused charged under s. 37(1) of Minor Offences Ordinance 1958 (Sarawak) (Cap 56) for offence of being found in possession of money in personal bank account without satisfactory explanation – Accused pleaded guilty to charge after being explained by Magistrate on nature and consequences of pleading guilty – Magistrate used term 'shall' although it was discretionary for Magistrate to impose imprisonment sentence – Whether misled accused to his prejudice – Whether amount to miscarriage of justice*

WORDS & PHRASES: *'anything' and 'thing' – Minor Offences Ordinance 1958 (Sarawak) (Cap 56), s. 37(1) – Ejusdem generis – Whether money found in personal bank account chose in action – Whether section applicable to tangible and intangible properties*

This was an appeal by the appellant against the conviction and sentence decided by the Magistrates' Court. There, the appellant was charged under s. 37(1) of the Minor Offences Ordinance 1958 (Sarawak) (Cap 56) ('Ordinance') for the offence of being found in possession of RM1,200, in her bank account, but failed to give any satisfactory explanation regarding the same ('charge'). After the appellant was explained on the nature and

consequences of pleading guilty by the Magistrate ('explanation'), the appellant pleaded guilty to the charge. The appellant was sentenced to a fine of RM500, in default, imprisonment of seven days. In the present appeal, the appellant raised the following issues: (i) whether the charge was defective considering that the money found in the appellant's bank account was a chose in action, and not a tangible property which fell under the definitions of 'anything' and 'thing', as required under s. 37(1) of the Ordinance; and (ii) whether there was non-compliance by the Magistrate on s. 173(b) of the Criminal Procedure Code because during the explanation, the Magistrate had used the term 'shall' although under s. 37(1) of the Ordinance, it was discretionary for the Magistrate to impose an imprisonment sentence towards the appellant. According to the appellant, that had misled her to plead guilty and it amounted to a miscarriage of justice.

Held (allowing appeal; setting aside conviction and sentence by Magistrates' Court):

(1) In interpreting the terms 'anything' and 'thing' under s. 37(1) of the Ordinance, it is crucial to consider the context of the entire provision, particularly the definition of 'possession' provided by s. 37(4) of the Ordinance. These terms must be interpreted within the legal framework of the Ordinance, particularly in relation to how 'possession' is defined in s. 37(4) and in line or harmoniously with other provisions of s. 37. Section 37(4) defines 'possession' as referring to tangible items that are stored or kept in physical locations, such as a house, building, vehicle, ship, vessel, boat or other place, as well as possession on a public road or in a public place ('preceding terms'). The preceding terms in s. 37(4) form a category or *genus* of physical locations where tangible items can be stored or concealed. The principle of *ejusdem generis* dictates that the general terms 'other place' or 'place' in s. 37(4) should be construed to be confined to the same or similar types of physical locations as the preceding terms, that is, physical locations where tangible items can be stored or concealed. Monies in a bank account, credited to an account holder, are considered as a 'chose in action' which represents a personal right to possess property that can be enforced through legal action rather than physical possession. Essentially, these funds signify a claim against the bank rather than a tangible asset that one can physically hold. The general terms 'other place' or 'place' in s. 37(4) do not extend to intangible or abstract concepts like monetary claims or credit balances in financial instruments. These concepts lacked the physical characteristics associated with the preceding terms. Moreover, s. 37(6) to (9) of the Ordinance outlines the procedures for searching physical locations and seizing property found therein. These procedures are designed for tangible items that can be physically handled, transported

and presented before a Magistrate. In contrast, monies in a bank account cannot be seized in the same manner. This distinction clearly indicates the legislative intent that s. 37(1) is not intended to apply to intangible assets, such as funds held in bank accounts. As such, considering that the charge was in respect of a chose in action, it cannot legally constitute an offence under s. 37(1) of the Ordinance. The guilty plea by the appellant was therefore invalid and the conviction based on it could not stand. By applying the revisionary powers, the appellant's conviction and sentence imposed by the Magistrate was hence set aside. Additionally, the fine of RM500 paid by the appellant was ordered to be refunded. (paras 17-23, 25-27 & 42)

(2) Section 37(1) of the Ordinance grants the Magistrate the discretion to either impose both fine and imprisonment sentences, or only one of those. Considering the discretion, the use of the term 'shall' by the Magistrate was not improper and a mere irregularity which did not invalidate the proceedings unless it could be shown to have resulted in a failure of justice. Even if the appellant understood the term 'shall' to mean that both fine and imprisonment sentences would be imposed upon her for her guilty plea, and even if she believed an imprisonment sentences would be mandatory, she had ample opportunity to retract her plea, which she chose not to do. This demonstrated that the use of the term 'shall' was not a significant concern to the appellant or materially impacted her situation. Given that the appellant was fully aware of her options, had the opportunity to withdraw her plea, and was only fined RM500 without being imposed with an imprisonment sentence, there was no reasonable basis for claiming that the appellant was misled to her prejudice, or a miscarriage or failure of justice had occurred. If not because of the defective charge, the appellant's guilty plea, along with her conviction and the sentence imposed upon her, would have stand. (paras 33-39 & 41)

Case(s) referred to:

Harpajan Kaur Delib Singh v. PP [2021] 3 CLJ 704 HC ***(refd)***
Manokaran & Anor v. PP [1978] CLJU 118; [1978] 1 LNS 118 HC ***(refd)***
Meor Sazali Meor Abdullah v. PP [2023] CLJU 2044; [2023] 1 LNS 2044 HC ***(refd)***
Mok Chee Cheong v. PP [2022] 5 CLJ 403 HC ***(refd)***
Municipal Commissioner v. Chua Seng [1882] 3 Kyshe 149 ***(refd)***
Powell v. Kempton Park Racecourse Co [1899] AC 143 ***(refd)***
PP lwn. Linges Ragunathan & Kes Yang Lain [2024] 8 CLJ 71 HC ***(refd)***
PP lwn. Mohd Redzwan Md Yatim & Yang Lain [2023] CLJU 1354; [2023] 1 LNS 1354 HC ***(refd)***
PP lwn. Ng Wai Kuan & Yang Lain [2023] CLJU 553 [2023] 1 LNS 553 HC ***(refd)***
PP lwn. Rokiah Abdul Kadir & Yang Lain [2024] CLJU 1350 HC ***(refd)***
Sures Perumal v. PP [2001] 2 CLJ 88 HC ***(refd)***

A **Legislation referred to:**
Criminal Procedure Code, ss. 156, 173(b), 323, 422
Interpretation Ordinance 2005 (Sarawak) (Cap 61), s. 44
Minor Offences Act 1955, s. 29(1)
Minor Offences Ordinance 1958 (Sarawak) (Cap 56), s. 37(1), (4), (6), (7), (8), (9)

B *For the appellants - Ranbir Singh Sangha; M/s Ranbir S Sangha & Co*
For the respondent - Mark Kenneth Netto; DPP

[Editor's note: Appeal from Magistrates' Court; Criminal Case No: SBW-83-596-12-2023.]

Reported by Syamim Ariffin

C

JUDGMENT

Wong Siong Tung J:

Introduction

D

[1] The appellant, Ezreen Nasuha binti Razuli, is appealing against her conviction and sentence imposed by the Magistrates' Court for an offence under s. 37(1) of the Minor Offences Ordinance 1958. She pleaded guilty to the offence on 11 December 2023 and was consequently fined RM500, in default, imprisonment of seven days.

E

[2] The offence with which the appellant was charged is as follows:

> That you on 26th August 2023 at Lot 424 Jalan Sentosa Salim, in the district of Sibu, in the State of Sarawak, was found in possession of RM1200 (Ringgit Malaysia One Thousand and Two Hundred) which is
F unlawfully obtained in your CIMB personal account bearing the account number 7033133654 and you have failed to an account satisfactorily of how you came by such thing, thereby you had committed an offence under s. 37(1) of Minor Offences Ordinance Sarawak and punishable under the same section.

G **[3]** The grounds of the appellant's appeal can be summarised into two main points as follows:

(i) the charge against the appellant is defective, as it involves monies in a bank account, which are considered a "chose in action" and not tangible property under s. 37(1) of the Minor Offences Ordinance 1958; and

H (ii) non-compliance with s. 173(b) of the Criminal Procedure Code, as the learned Magistrate failed to properly explain the nature and consequences of the guilty plea. This misled the appellant into pleading guilty, thereby causing prejudice and resulting in a miscarriage of justice.

I

Defective Charge

[4] The offence directed at the RM1,200 found in the appellant's bank account, which was allegedly obtained unlawfully and for which the appellant failed to provide a satisfactory explanation for how the funds got into her account.

[5] Relying on the case as decided in *Harpajan Kaur Delib Singh v. PP* [2021] 3 CLJ 704; [2021] 7 MLJ 678, learned counsel for the appellant submitted that the charge against the appellant is defective and the facts as stated therein are not capable of constituting an offence under s. 37(1) of the Minor Offences Ordinance (Sarawak) (Cap. 56) because the monies in the bank account are considered "chose in action" and not tangible property. It is contended that the monies found in the appellant's bank account does not fall under the definition of "anything" in s. 37(1) of the Minor Offences Ordinance (Sarawak) (Cap. 56).

[6] The learned counsel for the appellant also submitted that the charge did not state that the monies had been withdrawn, meaning the appellant did not have possession of the monies.

[7] The learned DPP on the other hand, submitted that the words "anything" and "thing" in s. 37(1) of the Minor Offences Ordinance (Sarawak) (Cap. 56) includes both tangible and intangible property such as monies in the bank account by relying on the case of *Mok Chee Cheong v. PP* [2022] 5 CLJ 403; [2022] MLJU 191 and the case of *PP lwn. Linges Ragunathan & Kes Yang Lain* [2024] 8 CLJ 71; [2024] MLJU 1125.

[8] All these cases relied on by the learned appellant's counsel and the learned DPP are decided by the High Court upon interpretation of s. 29(1) of the Minor Offences Act 1955 which is similarly worded as s. 37(1) of the Minor Offences Ordinance (Sarawak)(Cap. 56)

[9] In *Harpajan Kaur Delib Singh v. PP* [2021] 3 CLJ 704; [2021] 7 MLJ 678, the High Court ruled that funds in a bank account are "chose in action" and not physical property. As the bank acts as a debtor, an account holder does not possess these funds. The court held that possession under s. 29(1) of the Minor Offences Act 1955 applies only to tangible, movable property, excluding intangible assets like bank funds. Therefore, such funds do not qualify as "property" under the Act, rendering any charges based on their possession invalid. It was also decided that such defective charges cannot be cured by application of s. 156 or s. 422 of the Criminal Procedure Code.

[10] The ruling in *Harpajan Kaur Delib Singh v. PP* (*supra*) was followed by the High Court in *PP lwn. Ng Wai Kuan & Yang Lain* [2023] CLJU 553; [2023] 1 LNS 553; *PP lwn. Mohd Redzwan Md Yatim & Yang Lain* [2023] CLJU 1354; [2023] 1 LNS 1354 and *PP lwn. Rokiah Abdul Kadir & Yang Lain* [2024] CLJU 1350.

[11] In the case of *Mok Chee Cheong v. PP* [2022] 5 CLJ 403; [2022] MLJU 191 relied on by the learned DPP, the High Court in that case did not make a definitive decision on whether monies in a bank account are capable of possession or considered a "thing" under s. 29(1) of the Minor Offences Act 1955 as the issue was pending before the Court of Appeal then.

[12] In *Meor Sazali Meor Abdullah v. PP* [2023] CLJU 2044; [2023] 1 LNS 2044; [2023] MLJU 2278, the High Court also did not make a definitive ruling on whether monies in a bank account constitute "anything" under s. 29(1) of the Minor Offences Act 1955 and thus, the question remains unresolved in that case.

[13] In *PP v. Linges Ragunathan & Kes Yang Lain* (*supra*), the High Court noted that the DPP has not pursued the appeal of the ruling in *Harpajan Kaur a/p Delib Singh v. PP* (*supra*) to the Court of Appeal. The High Court in that case, however, did not follow the ruling in *Harpajan Kaur Delib Singh v. PP* (*supra*).

[14] The High Court in *PP v. Linges Ragunathan & Kes Yang Lain* (*supra*), gave a broad interpretation to "anything" and "thing" as "property" under s. 29(1) of the Minor Offences Act to include intangible assets like monies in the bank accounts to effectively address modern financial crimes, thereby protecting public interest.

[15] The Minor Offences Ordinance (Sarawak) (Cap 56) enacted more that 60 years ago, by s. 37 provides:

> Other Offences
>
> Fraudulent possession of property
>
> 37(1). Any person who has in his possession or conveys in any manner *anything* which may be reasonably suspected of being stolen or unlawfully obtained shall, if he fails to account satisfactorily how he came by *such thing*, be guilty of an offence: Penalty, imprisonment for three months and a fine of five hundred dollars.
>
> [Amended by Ordinance 16 of 1957]
>
> (2) If any person charged with having or conveying anything stolen or unlawfully obtained declares that he received such thing from some other person, or, that he was employed as carrier, agent or servant *to convey the same for some other person*, the Magistrate may cause all such other persons and, also, if necessary, every informer or pretended purchaser or other person *through whose possession the same has passed* (so long as that other person is alleged to have had possession of such thing within the jurisdiction of such Magistrate), to be brought before him and examined, and may examine witnesses upon oath touching the same.

(3) If it appears to such Magistrate that any person so brought before him had possession of such thing and had reasonable cause to believe the same to have been stolen or unlawfully obtained, such person shall be guilty of an offence: Penalty, imprisonment for three months and a fine of five hundred dollars.

[Amended by Ordinance 16 of 1957]

(4) The word "possession" in subsections (1), (2) and (3) includes possession *in a house, building, vehicle, ship, vessel, boat or other place, as well as possession in public road or place*.

(5) Any person who:

(a) having been convicted of an offence punishable under this section or under Chapter XII or Chapter XVII of the Penal Code; or

(b) having convicted in any other part of Malaysia or in any other part of the Commonwealth of an offence of a nature similar to any of those offences,

is subsequently convicted of an offence punishable under this section shall be guilty of an offence: Penalty, imprisonment for six months and a fine of one thousand dollars.

[Amended by Ordinance 16 of 1957]

(6) If information is given on oath to a Magistrate that there is cause to suppose that any property which may be reasonably suspected of being stolen or unlawfully obtained is *within any house, building, ship, vessel, boat or other place*, such Magistrate may, by warrant directed to any police officer, *cause such house, building, ship, vessel, boat or other place* to be entered and searched at any hour of day or night.

(7) The information mentioned in subsection (6) shall describe the property which it is reasonably suspected has been stolen or unlawfully obtained, and *shall also describe the house, building, ship, vessel, boat or other place* in which such property is suspected to be.

(8) If, upon the making of the search, any property, such as that described in the information, is *found in the house, building, ship, vessel, boat or other place*, the police officer making the search or some other police officer *shall convey such property before a Magistrate, or guard the same on the spot, or otherwise dispose of that .property in some place of safety*.

(9) The police officer making the search or some other police officer shall also take into custody and carry before a Magistrate *every person in such house, building, ship, vessel, boat or other place in whose possession or under whose control such property is found*.

(10) The provisions of sections 64, 68 and 69 of the Criminal Procedure Code shall apply to searches made under this section.

(emphasis added)

[16] After reading and considering the reasoning in both *Harpajan Kaur Delib Singh v. PP* (*supra*) and *PP lwn. Linges Ragunathan & Kes Yang Lain* (*supra*), along with a careful examination of the provisions under s. 37 of the Minor Offences Ordinance (Sarawak) (Cap 56), this court prefers the reasoning and ruling in *Harpajan Kaur Delib Singh v. PP* (*supra*).

[17] In interpreting s. 37 of the Minor Offences Ordinance (Sarawak) (Cap 56), the terms "anything" and "such thing" as used in s. 37(1), it is crucial to consider the context of the entire provision, particularly the definition of "possession" provided by s. 37(4) of the Ordinance. In other words, these terms must be interpreted within the legal framework of the Ordinance, particularly in relation to how "possession" is defined in s. 37(4) of the Ordinance and in line or harmoniously with other provisions in s. 37 of the Ordinance.

[18] Section 37(4) of the Minor Offences Ordinance (Sarawak) (Cap 56) defines "possession" as referring to tangible items that are stored or kept in physical locations, such as a house, building, vehicle, ship, vessel, boat, or other place, as well as possession on a public road or in a public place.

[19] The terms "house, building, vehicle, ship, vessel, boat," preceding "other place," and "public road" preceding "place," in s. 37(4) form a category or *genus* of physical locations where tangible items can be stored or concealed.

[20] The principle of *ejusdem generis* (of the same kind) dictates that the general terms "other place" or "place" in s. 37(4) should be construed to be confined to the same or similar types of physical locations as the preceding terms, that is physical locations where tangible items can be stored or concealed.

[21] Monies in a bank account, credited to an account holder, are considered a "chose in action", representing a personal right to possess property that can be enforced through legal action rather than through physical possession. Essentially, these funds signify a claim against the bank rather than a tangible asset that one can physically hold.

[22] The general term "other place" or "place" in s. 37(4) of the Minor Offences Ordinance (Sarawak) (Cap. 56) do not extend to intangible or abstract concepts like monetary claims or credit balances in financial instruments. These concepts lack the physical characteristics associated with the preceding terms, namely, "a house, building, vehicle, ship, vessel, boat," or "public road."

See: *Powell v. Kempton Park Racecourse Co* [1899] AC 143.

[23] Furthermore, ss. 37(6) to 37(9) of the Minor Offences Ordinance (Sarawak) (Cap. 56) outline procedures for searching physical locations and seizing property found therein. These procedures are designed for tangible

items that can be physically handled, transported, and presented before a Magistrate. In contrast, monies in a bank account cannot be seized in the same manner. This distinction clearly indicates the legislative intent that s. 37(1) is not intended to apply to intangible assets, such as funds held in bank accounts.

[24] The court's role is to interpret, ensuring that the intentions of the Legislature are adhered to and apply the law as enacted by the Legislature, not to create or legislate new laws. If there are perceived loopholes or inadequacies in the law, particularly concerning emerging commercial crimes, it is the responsibility of the Legislature to address these issues through new legislation or amendments to existing laws.

[25] For these reasons, the charge against the appellant for possessing RM1,200 in her bank account, a chose in action, cannot legally constitute an offence under s. 37(1) of the Minor Offences Ordinance (Sarawak Cap 56).

[26] As such, the appellant's guilty plea is invalid, as it pertains to something that is not an offence. Consequently, the conviction based on this guilty plea cannot stand.

See: *Municipal Commissioner v. Chua Seng* [1882] 3 Kyshe 149; *Manokaran & Anor v. PP* [1978] CLJU 118; [1978] 1 LNS 118; [1979] 1 MLJ 262 and *Sures Perumal v. PP* [2001] 2 CLJ 88; [2001] 2 MLJ 106.

[27] Accordingly, this court ought to, exercise its revisionary powers to set aside the appellant's conviction and the imposed sentence.

Improper Explanation Of Nature And Consequences Of The Guilty Plea

[28] In case this court is wrong regarding the defective nature of the charge, this court will also address the grounds related to non-compliance with s. 173(b) of the Criminal Procedure Code as part of the appellant's appeal.

[29] After the appellant indicated her guilty plea voluntarily, the learned Magistrate proceeded to explain to the appellant, the nature and consequences of her guilty plea as recorded in the notes of proceedings, which are reproduced as follows:

> Q10: Do you understand that pursuant to under section 37 of the Sarawak Minor Offences Ordinance 1958, upon conviction, you **shall** be punished with imprisonment for three (3) months and a fine of five hundred ringgit (RM500.00).
>
> Accused: Yes.
>
> (emphasis added)

[30] Learned counsel for the appellant submitted that the Magistrate incorrectly explained the nature and consequences of the guilty plea, seemingly by using the word "shall", which led the appellant to believe that imprisonment was mandatory when, in fact, it was discretionary. It is thus contended that there was non-compliance with s. 173(b) of the Criminal Procedure Code.

[31] The DPP submitted that this issue is irrelevant, as the Magistrate did not impose any imprisonment sentence, only a fine of RM500.

[32] In essence, the appellant's complaint is that she was not informed that the imprisonment sentence was discretionary.

[33] Under s. 37(1) of the Minor Offences Ordinance (Sarawak) (Cap. 56), the penalty for the offence is stated as "imprisonment for three months and a fine of five hundred dollars", granting the learned Magistrate a discretion to impose either both a fine and imprisonment, or only one of these penalties – either a fine or imprisonment. This is based on the provision under s. 44 of the Interpretation Ordinance, 2005 (Sarawak) (Cap. 61).

[34] Since the learned Magistrate has the discretion to impose a fine together with an imprisonment sentence, the use of the term "shall" by the Magistrate is not improper.

[35] If the learned Magistrate's use of the term "shall" did not accurately reflect the discretionary nature of his power in imposing the punishment for the offence committed, it constitutes a mere irregularity. Such an irregularity does not invalidate the proceedings unless it can be shown to have resulted in a failure of justice.

See: s. 422 of the Criminal Procedure Code.

[36] Even if the appellant understood the term "shall" used by the learned Magistrate to mean that both a fine and an imprisonment sentence would be imposed upon her for her guilty plea, and if she believed imprisonment sentence was mandatory, and was concerned about this, she had ample opportunity to retract her guilty plea, which she chose not to do.

[37] This demonstrates that the learned Magistrate's explanation regarding the nature and consequences of the sentence – specifically whether imprisonment was mandatory due to the use of the term "shall" – was not a significant concern for the appellant.

[38] Furthermore, as submitted by the learned DPP, the learned Magistrate imposed only a fine of RM500, without any imprisonment sentence. If the appellant had truly understood the learned Magistrate to mean that imprisonment was mandatory, this outcome never have materialised.

[39] Given that the appellant was fully aware of her options, had the opportunity to withdraw her plea, and was only fined without any imprisonment imposed, there is no reasonable basis for claiming she was misled to her prejudice or that a miscarriage of justice or failure of justice occurred. The appellant's choice to maintain her guilty plea, despite the Magistrate's explanation and her opportunity to retract, demonstrates that any alleged misunderstanding did not materially impact her situation.

[40] In summary, the combination of the Magistrate's explanation, the appellant's opportunity to withdraw her plea, and the actual sentence imposed collectively demonstrate that the appellant was not misled to her prejudice, and there was no miscarriage of justice or failure of justice.

[41] Hence, if not because of the defective charge, the appellant's guilty plea, along with her conviction and the sentence imposed by the learned Magistrate, should be upheld.

Conclusion

[42] In light of the finding that the charge is defective and invalid for the reasons stated, this court, exercising its revisionary power under s. 323 of the Criminal Procedure Code, hereby sets aside the conviction and sentence imposed upon the appellant by the learned Magistrate on 11 December 2023. Additionally, this court orders that the fine of RM500 paid by the appellant be refunded.